GURDEV KAUR BHAG SINGH

v.

BSN COMMERCIAL BANK (M) BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ALAUDDIN MOHD SHERIFF JCA
RICHARD MALANJUM JCA
[CIVIL APPLICATION NO: W-08-249-02]
11 DECEMBER 2002

CIVIL PROCEDURE: *Appeal - Leave to appeal to Federal Court - Application to extend time to file notice of appeal filed in and dismissed by Court of Appeal - Whether not a judgment or order respecting matter decided by High Court - Whether not amenable to further appeal - Courts of Judicature Act 1964, ss. 96, 97*

The applicant had filed two notices of motion in the present court seeking to extend time to file and serve notices of appeal, firstly in respect of an order for sale granted by the High Court and secondly in respect of the court's refusal to stay execution thereof. Before the learned judges, the applicant attributed the delay in filing the proper notices of appeal to her former solicitor, for allegedly failing to exercise due diligence in the handling of the cases. There being no other ground offered to explain the delay, a question hence arose as to whether the applications herein ought to be dismissed for lack of merit, and if so, whether there was any recourse for a further appeal to the Federal Court.

Held:

Per Richard Malanjum JCA

[1] The grounds as advanced by the applicant in support of the two applications were without merit. The explanation given for the delay in filing the proper notice of appeal against the order for sale is not a good reason for this court to exercise its discretion and grant leave. Likewise, the reason given for the delay for filing the notice of appeal against the refusal to grant stay was unsatisfactory. (p 433 a-b)

[2] This court's refusal to allow the applications of the applicant is not an order or judgment that comes within the ambit of s. 96(a) of the Courts of Judicature Act 1964. Accordingly the matter ends in this court and there is therefore no reason for this court to give its grounds for the refusal if the purpose is for further appeal. (p 432 h)

[Applications dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Di mahkamah ini, pemohon telah memfail dua notis usul memohon perlanjutan masa bagi memfail dan menyerahkan notis-notis rayuan, pertama berhubung suatu perintah jualan yang dibuat oleh Mahkamah Tinggi dan kedua berhubung keengganan mahkamah tersebut menggantung perlaksanaan perintah jualan berkenaan. Di hadapan yang arif hakim-hakim, pemohon menyatakan bahawa kegagalannya memfailkan notis-notis rayuan secara teratur adalah disebabkan oleh peguamcaranya yang terdahulu, yang tidak mengendalikan kes-kesnya dengan penuh kepekaan. Pemohon tidak mengemukakan apa-apa alasan lain, dan oleh yang demikian, persoalan berbangkit sama ada permohonan pemohon di sini tidak bermerit dan harus ditolak, dan jika begitu, sama ada ianya masih terbuka bagi pemohon untuk merayu seterusnya ke Mahkamah Persekutuan.

Diputuskan:
Oleh Richard Malanjum HMR

[1] Alasan-alasan seperti yang dikemukakan oleh pemohon bagi menyokong permohonannya adalah tidak bermerit. Penjelasan yang dikemukakan bagi kelengahan memfail notis rayuan yang teratur terhadap perintah jualan tidak memberikan sebab yang kuat bagi mahkamah ini menggunakan budibicaranya dan memberi izin. Begitu juga dengan alasan yang diberikan bagi kelengahan memfail notis rayuan terhadap keengganan menggantung perlaksanaan, di mana alasannya adalah tidak memuaskan.

[2] Keengganan mahkamah ini membenarkan permohonan-permohonan pemohon bukan merupakan suatu perintah atau penghakiman dalam ertikata peruntukan s. 96(a) Akta Kehakiman Mahkamah 1964. Ianya mengikut bahawa halperkara ini harus terhenti di mahkamah ini dan tiada sebab bagi mahkamah ini untuk memberikan alasan-alasan bagi penolakan permohonan tersebut jika tujuannya adalah untuk suatu rayuan lanjut.

[Permohonan ditolak.]

Case(s) referred to:
Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 ***(foll)***
Brijkishore & Anor v. Lee Chooi Ying [1987] 1 MLJ 110 ***(refd)***
Capital Insurance Bhd v. Aishah Abdul Manap & Anor [2000] 4 CLJ 1 ***(foll)***
Lam Kong Co Ltd v. Thong Guan Co Pte Ltd [2000] 3 CLJ 769 ***(foll)***
Sinnathamby & Anor v. Lee Chooi Ying [1987] 1 CLJ 157; [1987] CLJ (Rep) 336 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 96(a), 97

For the appellant/applicant - Jasbir Kaur Sidhu; M/s Jasbir Sidhu & Assoc
For the respondent - Evelyna Appaduray; M/s EJ Appaduray & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S2-24-1551-2000]

Reported by WA Sharif

JUDGMENT

Richard Malanjum JCA:

At the outset we say that as the matter before us originated in this court there is therefore no further appeal. That has been clearly enunciated by the apex court of this country since 1995. We will shortly elaborate our reasons. But first and briefly the nature and the events that led the applicant to come before this court.

The applicant filed two notices of motion dated 4 March 2002 ('the first motion') and 9 October 2002 ('the second motion') respectively.

The first motion was an application to extend time to file and serve a notice of appeal in connection with the order of the High Court, Kuala Lumpur made on 23 August 2001 ('the order for sale') wherein it was ordered that the property namely Lot No. 48 Section 97 on C.T. 13773 in Bandar Kuala Lumpur duly registered under the name of the applicant and charged to the respondent be sold by way of public auction.

The second motion was also an application for an extension of time to file and serve a notice of appeal. However it was in relation to the refusal by the High Court Kuala Lumpur on 5 August 2002 to stay the execution of the order for sale. Incidentally the stay application first came up for hearing on 23 May 2002 before the High Court but it was deferred to 5 August 2002. Learned counsel for the applicant then requested for an adjournment of the resumed hearing on the ground that she was about to deliver a baby. The High Court nevertheless proceeded with the hearing and subsequently dismissed the stay application.

On 11 October 2002 we heard both the applications and after hearing learned counsel for the parties we accordingly dismissed them.

The applicant has now filed with the Federal Court an application for leave to appeal against the dismissal of both the notices of motion.

Now as alluded to hereinabove it is settled law that where a matter originates in this court there is no appeal to the Federal Court. That has been succinctly propounded in *Auto Dunia Sdn. Bhd. v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485 where his Lordship Edgar Joseph FCJ said this at p. 487:

So far as the Federal Court, which is the ultimate court of appeal, is concerned, in respect of appeals to it from the Court of Appeal in civil matters, its appellate jurisdiction flows from s. 96 of the Act which provides:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court granted in accordance with section 97
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction; and
>
> (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

The question of law, which arose upon the preliminary objection was whether, having regard to the language of the relevant statutory provisions, the legislature had intended to confine the power to give leave to appeal exclusively to the Court of Appeal.

It is an elementary proposition that this court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies.

It follows that the answer to the question of law posed above, having regard to the circumstances of the present case, depended upon whether the refusal of leave by the Court of Appeal was a judgment or order within the meaning of s. 96(a) of the Act. At the conclusion of the arguments, my view was that it was not. (emphasis added).

And such interpretation of the relevant statutory provision in the Courts of Judicature Act 1964 ('the Act') has been consistently followed in at least two other cases before the apex court namely, *Lam Kong Company Limited v. Thong Guan Co. Pte. Ltd.* [2000] 3 CLJ 769 and *Capital Insurance Bhd. v. Aishah bte Abdul Manap & Anor* [2000] 4 CLJ 1.

In the instant case we have no doubt that our refusal to allow the applications of the applicant is not an order or judgment that comes within the ambit of s. 96(a) of the said Act. Accordingly the matter ends in this court and there is therefore no reason for us to give our grounds for the refusal if the purpose is for further appeal.

In any event we did consider the grounds advanced in support of the two applications and we found no merit in them. In the first motion the explanation given for the delay in filing the proper notice of appeal against the order for sale is squarely put to the former solicitor of the applicant in that it was alleged that he did not do his work and did not keep the applicant informed of the status of the case. That is not a good reason for us to exercise our discretion and grant leave. The applicant can always seek remedy elsewhere if she has any grievance against her former solicitor. It is settled law that mistake of one's solicitor is not necessarily a good excuse. (See: *Sinnathamby & Anor v. Lee Chooi Ying* [1987] 1 CLJ 157; [1987] CLJ (Rep) 336; *Brijkishore & Anor v. Lee Chooi Ying* [1987] 1 MLJ 110).

As for the delay in the second motion we are also of the view that the reason given is unsatisfactory. Her solicitor should have been more acquainted with the procedural aspect of applying for an adjournment instead of merely writing a letter to the court. Due diligence should have been shown to enquire on the status of the application instead of waiting for a few months to make a search. Such mistake or omission is not *ipso facto* a reason for us to exercise our discretion in favour of the applicant.

For the above reasons we dismissed both the applications with agreed cost of RM100 to the respondent.